Filed 7/13/10 Kondolay v. Smith CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MANOHAR KONDOLAY,

Plaintiff and Appellant,

v.

GLEN WILLIAM SMITH,

Defendant and Respondent.

F058839

(Super. Ct. No. CV265583)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Manohar Kondolay, in propria persona, for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

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Plaintiff Manohar Kondolay, in propria persona, purports to appeal from two orders: the first denied his request for a default judgment and dismissed his case for lack of jurisdiction, and the second denied his subsequent motion under Code of Civil

[*] Before Gomes, Acting P.J., Hill, J. and Kane, J.

Procedure section 473, subdivision (b), which in part sought relief from the first order.[1] We find the appeal untimely as to the first order, and therefore limit Kondolay's appeal to a challenge of the second one. Kondolay, however, fails to make any appellate arguments with respect to the second order. Accordingly, we will affirm it.[2]

FACTUAL AND PROCEDURAL HISTORIES

On October 6, 2008, Kondolay, who is incarcerated in the federal prison in Taft, filed a verified complaint in Kern Superior Court against Glen William Smith, a resident of British Columbia, Canada, as the sole named defendant and Does 1 to 100. Kondolay alleged that before his incarceration, he was in the business of cultivating, packing and distributing fresh and frozen berries in the United States and Canada, on a farm located on the border between the United States and Canada. Due to financial problems, Kondolay agreed to lease the farm and processing plant to defendants, who agreed to purchase raw berries from Kondolay and have Kondolay process them.

Kondolay alleged on information and belief that after he would ship frozen berries to a company located in British Columbia, defendants would transfer the berries to his own warehouses, add contraband drugs to the berries, and ship the berries back to the company. From there, the berries were transported to warehouses in Washington, California and Oregon, where the drugs were separated from the berries. Kondolay further alleged when he learned of the illegal activities he confronted defendants, who said Kondolay's life would be in danger if he talked to police. When defendants were arrested a few years later, Kondolay contacted the Royal Canadian Mounted Police to tell them about the illegal activities and defendant's threats. He agreed to speak with agents

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise stated.

[2] No respondents' brief was filed in this matter. Accordingly, we decide the appeal based on the record, the opening brief and any oral argument. (Cal. Rules of Court, rule 8.220(a)(2).)

from the United States Drug Enforcement Agency (DEA) and traveled to the United States with a Canadian police detective to do so. When Kondolay met with the DEA agents a few months later, they arrested him and transported him to federal court in Seattle, where he was incarcerated and threatened by inmates. Kondolay accepted a plea bargain after the United States government froze his assets in the United States and Canada. The complaint asserts 12 causes of action, including negligence, intentional and negligent infliction of emotional distress, stalking, false imprisonment, fraud, deceit, misrepresentation, intentional interference with prospective economic advantage, and conversion.

Kondolay, through another individual, served Smith with the summons and complaint by substituted service at his address in British Columbia, Canada. In February 2009, Kondolay requested entry of default, which the clerk entered on February 25, 2009.[3]

On May 12 the trial court denied Kondolay's request for a default judgment and ordered the complaint dismissed for lack of jurisdiction. The court found that Kondolay failed to establish the court's jurisdiction over (1) Smith, since Smith was not served pursuant to the Hague Convention, and (2) the subject matter of the lawsuit, since Kondolay had not submitted any admissible evidence to establish Smith's alleged acts arose out of or were related to California, or a substantial nexus between Smith's alleged acts and California. The court explained that the paragraphs in the verified complaint alleged on information and belief are not evidence, and the allegations in paragraph seven, which states that "[m]aterial acts and [p]hysical injury giving rise to this [c]omplaint occurred within the county of Kern, or nearby counties in the State of California" and that the "misappropriated funds . . . were used to cause physical injury to the Plaintiff in the county of Kern in the State of California," were conclusory and in

[3] Unless otherwise stated, all further dates are for the year 2009.

conflict with the complaint's other paragraphs. On June 1, the court signed the order dismissing the action on the court's own motion. On June 2, the court filed and served the order on Kondolay by mail.

On July 8, Kondolay filed a motion seeking relief from the May 12 order, which the trial court deemed at the July 16 hearing on the motion as a motion for reconsideration. At the hearing, the court denied the motion on the following grounds: (1) lack of proper service pursuant to section 414.10; (2) lack of sufficient notice pursuant to section 1005, subdivision (b); (3) the failure to cite any authority for the motion; (4) as a motion for reconsideration, it was untimely, and the declaration in support of the motion did not satisfy the requirements of section 1008, subdivision (a). The court, however, did modify its previous order regarding personal jurisdiction over Smith, finding that service was obtained. A copy of the minute order was mailed to Kondolay that day.[4]

On July 31, Kondolay filed a motion seeking relief from the trial court's June 1 and July 16 orders pursuant to section 473, subdivision (b). Kondolay requested the court relieve him from the previous orders dismissing the case for lack of proper service and lack of sufficient notice. Kondolay set forth facts regarding his service of the summons and complaint on Smith, arguing that he had perfected service on Smith and therefore the court's prior orders should be set aside. A hearing was held on the motion on August 28. The court denied the motion, finding there was no proper authority for the motion and it was untimely under section 1008 as to subject matter jurisdiction. The court mailed a copy of the minute order to Kondolay on September 2.

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[4] Kondolay did not include this July 8 motion or the court's July 16 minute order in the appellant's appendix. Accordingly, on our own motion, we take judicial notice of the trial court's register of actions, which reflects the filing of the motion on July 8 and the July 16 minute order. (See Evid. Code §§ 452, subd. (d), 459, subd. (a).)

On September 11, Kondolay filed a notice of appeal, which stated that he was appealing from "the final Judgment entered in this action on [J]une 1, 2009 and on motion seeking from Court's June 1, 2009, and July 16, 2009, order pursuant to CCP § 473(B) entered on August 28, 2009."

DISCUSSION

Kondolay appeals from two orders: the June 1 order of dismissal, which was served on him by mail on June 2, and the August 28 order denying his motion under section 473.

We first address whether we have jurisdiction to consider Kondolay's appeal. California Rules of Court, rule 8.104(a) sets forth the normal time to appeal. As pertinent here, it provides: "Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was served; . . ." (Cal. Rules of Court, rule 8.104(a).) As used in this rule, a "judgment" includes an appealable order. (Cal. Rules of Court, rule 8.104(f).)

The court clerk served the June 1 order on Kondolay by mail on June 2. Calculating from that date, the 60-day period for filing a notice of appeal from the order dismissing his complaint expired in early August, more than a month before the September 11 notice of appeal was filed. (See Cal. Rules of Court, rule 8.104(a).)

A valid motion for reconsideration may extend the time to appeal. (Cal. Rules of Court, rule 8.108(e).) A party affected by a trial court order may apply for reconsideration of that order within 10 days after service of written notice of entry of the order. The application for reconsideration must be based on new or different facts, circumstances or law. (§ 1008, subd. (a); see *Crotty v. Trader* (1996) 50 Cal.App.4th 765, 771.) Kondolay filed a motion on July 8 seeking relief from the trial court's prior order, which the trial court treated as a motion for reconsideration. The trial court

concluded that Kondolay's motion did *not* comply with the statutory requirements for filing a motion for reconsideration. (See § 1008, subd. (a).) If the motion for reconsideration was invalid, it could not operate to extend the time for filing a notice of appeal from the appealable order. (See *Cox v. Certified Grocers of Cal., Ltd.* (1964) 224 Cal.App.2d 26, 30 [untimely notice of motion for new trial]; Cal. Rules of Court, rule 8.108(b)-(e) [requiring valid post-order motion to extend time for filing notice of appeal].)

Nothing in the record indicates that the July 8 motion was a "valid" motion for reconsideration. As used in California Rules of Court, rule 8.108(e), "'the word "*valid* " *means* only *that the motion or notice complies with all procedural requirements;* it does not mean that the motion or notice must also be substantively meritorious.'" (*Branner v. Regents of University of California* (2009) 175 Cal.App.4th 1043, 1047, quoting Advisory Com. com., 23 pt. 2 West's Ann.Codes, Rules (2009 supp.) foll. rule 8.108, p. 84, italics added by *Branner.*) Section 1008, subdivision (a) requires that a motion for reconsideration be made "within 10 days after service upon the party of written notice of entry of the order" that the movant seeks to modify, amend, or revoke, which deadline is not extended when the order is served by mail. (§ 1013, subd. (a); *Forrest v. Department of Corporations* (2007) 150 Cal.App.4th 183, 202-203 [party's service by mail on August 23, 2005 of a notice of entry of order started on that date the running of the 10-day time period set forth in § 1008, subd. (a), such that the opposing party's motion for reconsideration filed on August 29 of that year was timely under that subdivision]; Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group (2009) ¶ 9:362.1, p. 9(I)-120 (rev. #1, 2009).)

Because Kondolay was served by mail with a copy of the June 1 order on June 2, he was statutorily required to file his motion for reconsideration no later than June 12 — the 10th day after the June 2 service by mail. Kondolay, however, filed his motion on July 8. His motion for reconsideration, therefore, was untimely and thus invalid for

purposes of California Rule of Court, rule 8.108(e). Since the time to appeal was not extended, Kondolay's appeal from the June 1 order dismissing the complaint is untimely.

The only other order he challenges is the August 28 order denying his July 31 motion, in which he sought relief from the prior orders pursuant to section 473, subdivision (b). His appeal from that order is certainly timely, as it was filed within 60 days of the superior court clerk's mailing of the order to him on September 2. Kondolay, however, raises no arguments in his appellate brief with respect to the trial court's ruling on that motion. Instead, he addresses only the trial court's decision to dismiss the complaint, arguing it erred in doing so because it failed to construe his pleadings liberally and did not consider his status as an incarcerated pro per plaintiff. !(AOB 2-6)!

As a general rule, "an appealed judgment or order is *presumed to be correct.* 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 8:15, p. 8-5 (Eisenberg), citing, among others, *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) Also, "[a]ppellant has the burden of overcoming the presumption of correctness and, for this purpose, must provide an *adequate appellate record* demonstrating the alleged error." (Eisenberg, ¶ 8:17, p. 8-5; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) "Appellant's burden also includes the obligation to present *argument and legal authority* on *each point* raised. This requires more than simply stating a bare assertion that the judgment, or part of it, is erroneous and leaving it to the appellate court to figure out why; it is not the appellate court's role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness." (Eisenberg, ¶ 8:17.1, pp. 8-5 to 8-6.) "When appellant asserts a point but fails to support it with reasoned argument and citations to authority, the court may treat it as *waived* and pass it without consideration." (Eisenberg, ¶ 8:17.1, p. 8-6.)

Kondolay has failed to present any argument sufficient to overcome the presumption of correctness of the August 28 order. He does not address the reasons the trial court denied the July 31 motion, i.e. his failure to cite any proper authority for the motion or that it was untimely. In such circumstances, we must uphold the order. We acknowledge that Kondolay is representing himself on appeal. While under the law one may act as his own attorney, when a litigant does so, he is held to the same restrictive rules of procedure and evidence as an attorney. (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639; *Monastero v. Los Angeles Transit Co.* (1955) 131 Cal.App.2d 156, 160-161.)

DISPOSITION

The trial court's August 28, 2009 order is affirmed.